Filed 10/31/18 In re Montes CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re LOUIS RAMON MONTES, on Habeas Corpus.	E069533 (Super.Ct.Nos. FVI012901 & WHCJS1700300) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Stephen Ashworth, Judge. Petition granted in part and denied in part.

Louis Ramon Montes in pro. per.; Cynthia M. Jones, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Anthony Da Silva, Deputy Attorneys General, for Respondent.

Defendant and petitioner Louis Ramon Montes was convicted in 2003 of special circumstances murder, along with related crimes, and was sentenced to life without possibility of parole (LWOP) for crimes committed when he was 17 years old. After the United States Supreme Court ruled that mandatory LWOP sentences for juveniles was

prohibited in *Miller v. Alabama* (2012) 567 U.S. 460, 465 (*Miller*), the California Supreme Court ruled in *People v. Franklin* (2016) 63 Cal.4th 261 and *In re Kirchner* (2017) 2 Cal.5th 1040, that juveniles sentenced to LWOP were entitled to a hearing in order to have an opportunity to present information as to juvenile characteristics and circumstances. Montes filed a petition for writ of habeas corpus seeking such a hearing. We issued an order to show cause (OSC) why relief should not be granted. We now grant the petition in part and order the matter remanded with directions to the trial court to conduct a hearing at which Montes has the opportunity to present evidence of mitigating evidence tied to his youth at the time the offense was committed.

BACKGROUND

We recite the following relevant facts of the crime from our unpublished opinion. (*People v. Whitson* (Apr. 12, 2006, E036356).):

THE EVIDENCE PRESENTED AT TRIAL

A. *Background*

Ian Whitson and Montes met and became friends while in juvenile camp in early 2000. They reunited in November 2000, when Whitson moved with his family to Victorville. That month, Whitson turned 18 years old. April Peake was murdered on January 9, 2001, when she was 19 years old. Montes was 17 years old at the time of the murder.

Shortly after Whitson moved to Victorville, Whitson and Montes attended a party where Whitson met then 14- or 15-year-old Noelle Kofoed. Whitson became Noelle's

boyfriend and sometimes spent the night at the Kofoed home. April lived in the Kofoed home, and was a friend of Noelle's older sister, 17-year-old Tiffany Kofoed. Matthew Moore, then 18 years old, was Tiffany's boyfriend.

B. *The Plan to Rob Allen Kofoed's Pawn Shop and Murder Allen Kofoed*

During late 2000, Noelle told Whitson that her father, Allen, was abusive to her and "very violent" toward the family. Allen had moved out of the Kofoed home two years earlier, after separating from Alicia Kofoed, the mother of Noelle and Tiffany. Allen managed a pawn shop in Victorville.

In December 2000, Whitson approached Noelle about helping him and Montes rob Allen's pawn shop. According to Noelle, Whitson told her that Montes's friends wanted to rob the pawn shop of money, jewelry, and other items. The plan was to use a truck that belonged to one of Montes's friends. Noelle was going to participate in the robbery by taking the video surveillance tape out of the video recorder at the pawn shop. Noelle testified that she and Whitson discussed killing Allen and anyone else who was working at the pawn shop at the time of the robbery. But she also testified that she did not tell Whitson that she wanted Allen dead, and she never believed that Whitson was going to follow through with the plan.

Noelle's friend, 15-year-old Daniel O'Neal, was also going to be involved in the robbery. According to Daniel, about two weeks before April was murdered, Whitson told Daniel about a plan to use a friend's truck, murder Allen, and make it look like a robbery. Daniel refused to join the plan, and also did not believe that Whitson or Montes were

going to follow through with the plan. About two weeks after April was murdered, Daniel stole a license plate to be used on April's car.

Moore testified that Whitson and Montes told him about a plan to rob Allen's pawn shop and kill Allen with an ice pick. Whitson told Moore that they were planning to use April's car in the robbery. Moore understood that Whitson and Montes were going to take April's car "in a forcible way," but not kill April. Moore also did not believe they were going to go through with the plan to rob Allen's pawn shop or murder Allen.

By early 2001, the Kofoed household had become a gathering place for Whitson, Montes, Moore, and Daniel. There, the boys and the girls, Tiffany and Noelle, would sometimes drink alcohol or smoke marijuana in the Kofoed garage. They were often joined by Alicia and Alicia's 22-year-old boyfriend, Brian Trewhella. Alicia joined the group after the children she supervised in her home day care center had been picked up.

C. *The Murder of April*

On the evening of January 9, 2001, Whitson, Montes, and Moore were drinking at the Kofoed house. Moore had brought a bottle of gin. Noelle and Tiffany were there along with others. Whitson asked Tiffany when April would be home but did not say why he was asking. April arrived home with Alicia between 9:00 and 11:00 p.m.

April agreed to take Whitson, Montes, and Moore home to Whitson's house in her car. According to Noelle and Tiffany, the four left shortly after midnight. Noelle thought that Whitson, Montes, and Moore were intoxicated. Tiffany noticed that Whitson was hitting his palm with his fist as he and the others left the Kofoed house.

Moore was the only witness who testified about what happened in April's car on the way to Whitson's house. Moore was charged with the murder of April along with Whitson and Montes on January 29, 2001, but pleaded guilty to being an accessory after the fact in August 2001, in exchange for his agreement to testify truthfully and a maximum sentence of three years. Moore was released from custody following the entry of his guilty plea and after he gave a videotaped statement to a sheriff's detective. At the time of trial, Moore had not yet been sentenced.

Moore testified that, on the way to Whitson's house, April was in the driver's seat, Whitson was in the front passenger seat, Montes was in the rear seat directly behind April, and Moore was in the rear passenger seat. Whitson asked April to drive to a construction site on a cul-de-sac where houses were being built, and where Whitson said he wanted to buy some ecstasy pills. In return, Whitson was going to give April a couple of the pills.

As soon as April stopped her car at the site, Montes, who was still sitting behind April, took a 12-inch wrench out of his pants and struck April on the head with it one or two times. Montes "said that she wasn't knocking out," and gave the wrench to Whitson. Whitson got out of the car, went to the driver's side door, and struck April on the head with the wrench for approximately two minutes. The car door was open but April was still strapped into the seat. April fought back, and said, "Please. I'll do anything," but Whitson said, "Die, bitch."

Whitson pulled April out of the car. As another car approached on the main street, Whitson and Montes dragged April to the other side of her car until the other car had passed. Whitson and Montes then dragged April to a trench at the site and covered her with dirt. Either Whitson or Montes told Moore that they also struck April on the head with a rock, but Moore did not see that happen.

Whitson, Montes, and Moore drove April's car to Whitson's house and parked two blocks away. Inside the house, they went through April's purse. When someone realized that the wrench was still at the construction site, the three of them changed out of their bloody clothes and drove back to the site. There, they retrieved the wrench and returned to Whitson's house. They went to sleep in Whitson's room, with Moore sleeping on the floor and Whitson and Montes sleeping in Whitson's bed.

When the three of them awoke the next morning, Montes cleaned the wrench with bleach and they washed their bloody clothes. They then drove in April's car to a secluded area called Deep Creek, and onto a dirt road. There, they removed the bloody seat covers from the car. They burned the seat covers, along with other items that had been in the car and the shoes they were wearing the previous night. They also cleaned the interior of the car to remove blood stains. Then they drove back to Whitson's house and parked April's car where they had parked it earlier. Moore and Montes stayed at Whitson's house for approximately one hour, until Montes's dad picked them up.

It was not unusual for April to stay away from the Kofoed house for two or three days at a time. But it was unusual for her not to call to say what she was doing or where

she was, and she did not call on the night of January 9 to say she would not be returning home. On January 10, April's mother, Ann Bashaw, filed a missing person report.

D. *Discovery of the Murder*

San Bernardino County Sheriff's Detective Stark interviewed Whitson, Montes, and Moore on January 17 and 18, as part of the missing person investigation. Each of them told essentially the same story that, on the drive home, April received a page, excitedly said it was "Landon," and dropped the three of them off at Whitson's house. They did not see her again. According to Moore, Whitson invented the story about Landon. In fact, there was a Landon Dirnberger who had dated April. He testified that he and April stopped dating in December 2000 and he did not page her or see her after that time.

Whitson told Detective Stark that April's car was fairly clean and there was no clothing or trash in the car. Moore told Detective Stark that the car was extremely dirty; clothes were strung about and there were shoes in the car. Moore also said the car had leopard skin seat covers.

On January 18, after interviewing Whitson, Montes, and Moore, Detective Stark learned that April's car had been found about two blocks from Whitson's house. The car was locked and the ignition had not been punched. It appeared to be clean and had no seat covers. A deputy recalled that he had seen the car there for about a week. There were blood stains on the outside and interior of the car, and evidence that some blood had

been cleaned from the car. Some blood had been deposited when the driver's side door was open.

On January 20, a reserve deputy found a receipt with April's name on it while hunting near the Deep Creek area. The deputy contacted the homicide detective assigned to April's case. That day, deputies searched the Deep Creek area. They found clothing and shoes, and a purse that Tiffany later identified as April's. On January 22, April's body was found at the construction site.

Deputies interviewed Noelle two times before April's body was found. On both occasions, Noelle did not mention that Whitson and Montes told her they had killed April. At trial, Noelle testified that Whitson told her that Montes would kill her if she told anyone what she knew. On January 27, Noelle confided to her older sister, 19-year-old Karisa, that she knew who had killed April. On January 28, Noelle went to the sheriff's station and told a detective that Whitson and Montes told her they had killed April.

Also on January 28, Trewhella came to the sheriff's station and delivered the 12-inch crescent wrench that Moore later identified as the murder weapon. Trewhella had retrieved the wrench from the Kofoed's garage. He said the wrench was on a table, not in its usual place on a bench.

E. *Whitson's and Montes's Admissions to Noelle and Daniel*

Noelle testified that, a few days after April was missing, Whitson and Montes told her they had killed April. Whitson said they directed April to a place where Whitson

could buy ecstasy. There, Montes began hitting April with a wrench, then Whitson got out of the car and they both started hitting April with a wrench. Montes added that he threw a rock onto April's head. According to Whitson, Moore was throwing up and did not participate in the crime.

Daniel testified that, sometime after the murder, he was in Noelle's room with Whitson and Montes. There, Whitson and Montes told him essentially the same story they told Noelle about killing April. Noelle was in the room when Whitson and Montes began to tell Daniel about the murder, but left after they began talking about the murder.

After Noelle left the room, defendants told Daniel that April was not dead when they buried her in the trench, because her hand came out of the ground. At that point, Montes threw a rock onto April's head and starting stomping on the rock. They also said they had taken April's car to Deep Creek, cleaned it, and burned the things that were in the car. A couple of weeks after April was reported missing, but before her body was found, Daniel stole a license plate to be used on April's car because he was scared.

After April was reported missing, Noelle and Daniel went to Allen's pawn shop at Whitson's direction. According to Daniel, that was the day they were going to rob the pawn shop. When Whitson called the pawn shop, Noelle told him that the police were there looking for April, so they would not be able to rob the pawn shop that day. In fact, the police had not come to the pawn shop.

F. *The Forensic Evidence*

April was killed by multiple blunt force injuries to her head. There were 17 lacerations caused by a blunt object. One particularly large injury was consistent with the use of a rock, but also could have been caused by several blows by a smaller object to the same spot. The large injury was probably caused before April's body was dragged, because when April's body was dragged she was either dead or on the verge of dying. The lesser injuries were consistent with the use of a heavy tool such as a 12-inch crescent wrench. In fact, the laceration patterns for two of the lesser injuries were in the shape of a 12-inch crescent wrench. April also had defensive wounds on her arms and on the back of her hands. (*People v. Whitson*, *supra*, E036356.)

Montes, and his codefendant Whitson, were charged and convicted of first degree murder (Pen. Code, § 187; count 1),[1] with a true finding on special circumstances of lying in wait and murder during the commission of a robbery and carjacking (§ 190.2, subd. (a)(15) & (17)). The jury also found both guilty of carjacking (§ 215; count 2) and robbery (§§ 211 & 212.5; count 3) and found that each personally used a deadly weapon, a wrench, in the commission of the murder, carjacking, and robbery (§ 12022, subd. (b)). Montes was ultimately sentenced to life without the possibility of parole.[2] (*People v. Whitson*, *supra*, E036356.)

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Initially, the sentence included a determinate term for the conviction on count 2, the carjacking count, plus enhancements, but on direct appeal, we directed a stay of that portion of the sentence under section 654. (*People v. Whitson*, *supra*, E036356.)

We affirmed the convictions with directions for resentencing in 2006, and the California Supreme Court denied review. On September 5, 2017, defendant filed a petition for writ of habeas corpus in the San Bernardino Superior Court, seeking relief from his LWOP sentence under *Miller*, *supra*, 567 U.S. 460. That petition was denied as moot on October 23, 2017, because of the enactment of Senate Bill No. 394 (2017-2018 Reg. Sess.), which amended section 3051, establishing parole eligibility for juveniles serving LWOP terms.

On November 28, 2017, Montes filed his petition for writ of habeas corpus in this court, seeking the same relief. We issued an OSC and appointed counsel to represent defendant.

DISCUSSION

Montes was sentenced to LWOP when he was 17 years of age. After he was sentenced, the United States Supreme Court held that the Eighth Amendment to the federal Constitution prohibits a mandatory LWOP sentence for juvenile offenders and requires that a sentencing court consider the offender's age and the characteristics attendant to it. (*Miller*, *supra*, 567 U.S. 460, 465.) Shortly thereafter, the California Supreme Court held in *People v. Caballero* (2012) 55 Cal.4th 262 that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida* (2010) 560 U.S. 48 applied to sentences that were the "functional equivalent of a life without parole sentence," including Caballero's term of 110 years to life. (*Caballero*, at p. 268.)

It is now settled that a sentencing court must consider a juvenile offender's age and the characteristics attendant to it prior to imposing a LWOP sentence. (*Miller, supra*, 567 U.S. at p. 465; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1377.) The *Miller* holding was deemed to be substantive, and retroactive. (*Montgomery v. Louisiana* (2016) 577 U.S. ___ [193 L.Ed.2d 599, 136 S.Ct. 718, 734].)

Our Legislature has attempted to conform to these decisional mandates by enacting section 3051. That section originally applied only to juveniles sentenced to 15 or 25 years to life, but, effective January 2018, entitles a juvenile offender serving a sentence of LWOP to parole eligibility. (§ 3051, subd. (b)(4).) That subparagraph provides that a person convicted of a controlling offense before he or she turned 18, and for which the sentence is LWOP, shall be eligible for release on parole by the Board of Parole Hearings (BPH) during his or her 25th year of incarceration at a youth offender parole hearing.

Subdivision (e) of section 3051 requires that the offender shall be provided "a meaningful opportunity to obtain release," requiring the BPH to review and revise regulations regarding determinations of suitability. Subdivision (f)(1) of section 3051 permits the BPH to consider psychological assessments conducted by psychologists hired by the BPH to assess the youth offender's growth and maturity, while subdivision (f)(2) allows family members and others with knowledge of the individual before the crime or his or her growth and maturity after the crime to submit statements.

The Legislature also enacted section 4801, subdivision (c), which requires the BPH to review a prisoner's suitability for parole where the controlling offense was committed when he or she was 25 or younger and compels the BPH to give great weight to the diminished culpability of juveniles.

The People argue that these legislative acts render all *Miller* claims moot. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 268-269.) In *Franklin*, the court addressed the question directly and determined that "Penal Code sections 3051 and 4801—recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero*—moot Franklin's constitutional claim." (*Franklin*, at p. 268.) Nevertheless, the court determined that Franklin raised "colorable concerns as to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth." (*Id.* at p. 269.) The court thereafter remanded the matter to the trial court to permit that court to determine whether Franklin was given an adequate opportunity to make a record of his youth related factors. The same course of action is necessary in this case.

For juveniles sentenced to LWOP whose diminished culpability was not considered by the trial court, there is no record of mitigating evidence tied to defendant's age, youthful attributes, and capacity for reform and rehabilitation. Without such evidence, or a presumption, or an opportunity to develop a record as to those factors, subdivision (e) of section 3051, which provides that the youth offender parole hearing to

consider release and requires it to provide for a "meaningful opportunity to obtain release," is illusory.

This situation is not cured by the fact that subdivision (f) of section 3051 permits the BPH to consider psychological evaluations and risk assessment administered by licensed psychologists employed by the board, because, while they may "take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual," they may be performed years after the crime and, as in this case, years after the offender has reached adulthood. With each passing year, the relevant information necessary for these reports may become more difficult to obtain or unavailable.

A current evaluation which may "take into consideration the diminished culpability of youth" is not the functional equivalent of a sentence that takes into account the mitigating factors of youth. Additionally, the requirement that the BPH "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (§ 4801, subd. (c)), becomes impossible because there were no findings on this issue at the original sentencing. In other words, the text of the statute presupposes that information regarding the juvenile offender's characteristics and circumstances will be available at a youth offender parole hearing. (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 284, 286-287.) Without a mechanism to obtain such evidence, or a presumption that the factors were

present, the statutory amendments to section 3051 may ultimately prove inadequate to cure the *Miller* defect.

Additionally, no regulations that were required to be promulgated following enactment of sections 3051 and 4801 have been adopted to date. They have been "continuously delayed by the California Legislature's decisions to amend Penal Code sections 3051 and 4801. Sections 3051 and 4801 were amended in 2015 through Senate Bill No. 261 (2015-2016 Reg. Sess.) (hereafter SB 261), which became effective on January 1, 2016, and in 2017 through Assembly Bill No. 1308 (2017-2018 session) (hereafter AB 1308) and Senate Bill No. 394 (2017-2018 session) (hereafter SB 394), both of which became effective on January 1, 2018." (Calif. Regulatory Law Bulletin, 2018-18 CRLB 159, May 4, 2018.)

Thus, while the statutory scheme, on its face, appears to have addressed the Eighth Amendment flaws in the sentencing of youths to LWOP terms by making them eligible for a parole hearing, the lack of procedures by which persons like Montes have the opportunity to develop a record for their eventual parole hearings of their youth and characteristics at the time of the crime, may still work a de facto violation of the constitutional command.

Most recently, in *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131, the California Supreme Court ordered a remand to provide the defendant with an opportunity to supplement the record with information relevant to his eventual youth offender parole

hearing. The Supreme Court reasoned that affording the defendant with such a hearing would address his further claim that without an adequate opportunity to make a record of youth-related circumstances at the time of his offenses, his eventual parole hearing will not provide him with a " 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " (*Id.* at p. 1132, citing *Graham v. Florida*, *supra,* 560 U.S. at p. 75.)

Here, Montes was sentenced to LWOP in 2004. He claims that his counsel did not fully investigate or present evidence relating to his diminished culpability as a juvenile offender. Under recent statutory amendments, he will be statutorily provided a youth parole hearing, but the BPH will not have a record of the sentencing court's consideration of the offender's age and the characteristics attendant to it. In other words, his sentence may still not conform to *Miller.*

The People argue that remand is not authorized where the defendant's sentence was final before the enactment of section 3051 because the legislation guarantees a parole hearing for persons like Montes whose cases were final before *Miller* was decided. The People note that recent decisions remanding nonconforming sentences to the trial court to give the offender an opportunity to present mitigating evidence relating to their youth were all being reviewed on direct appeal. We are aware that conducting a hearing so long after the original sentence has been pronounced is problematical, but cannot reconcile the original sentencing which violated the Eighth Amendment at the time it was imposed with the recent enactment providing for evaluations and assessments prepared

for the youth parole hearing, that do not address *Miller* criteria.[3] We are aware that the Supreme Court has granted review in a recent case, where, under similar facts, our colleagues in Division Three of the Fourth Appellate District, remanded the matter to the superior court to give the defendant an opportunity to present evidence of his youthful characteristics. (*In re Cook* (2017) 7 Cal.App.5th 393, review granted Apr. 12, 2017, S240153.)

Nevertheless, we are concerned that the procedures for current evaluations and assessments of Montes in connection with a future parole hearing will not satisfy the constitutional mandate that the sentencing court have considered the youth factors in imposing sentence on a defendant who was a juvenile at the time of commission of the crime. Until our Supreme Court rules differently, or until the Legislature enacts a mandatory presumption that in all cases such as this, the factors of diminished culpability of juveniles will be deemed to be present, we conclude that the *Franklin* remedy of a

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[3] At oral argument, the People referred to the increased burden of conducting such hearings on trial courts, although it was acknowledged that there is nothing in the record demonstrating any impact from our decision. The bill analysis relating to Senate Bill No. 394 (Stats. 2017-2018, ch. 684) reveals the total number of youth affected by the provisions of section 3051 is roughly 300 statewide. (See Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 394 (2017-2018 Reg. Sess.) as amended Aug. 31, 2017, p. 4. <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB394> [as of Oct. 31, 2018]; see also, Cadelago, *California Youths Serving Life Will Get Possibility of Parole*, Sacramento Bee (Oct. 11, 2017), <https://www.sacbee.com/news/politics-government/capitol-alert/article178375836.html> [as of Oct. 11, 2018].) There is thus a finite number of youth offenders throughout the state who will or may require such hearings.

limited remand is required, despite the passage of years since the pronouncement of judgment.

DISPOSITION

The petition for writ of habeas corpus is granted in part and denied in part. The court denies Montes's request to vacate the judgment. Montes's sentence remains valid as Penal Code section 3051 has made him eligible for parole during his 25th year of incarceration. The court grants Montes's request for a *Franklin* hearing. The matter is remanded with directions to the trial court to conduct a hearing at which Montes has the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. The hearing must be conducted no later than 90 days from the date this opinion is final in this court.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

RAMIREZ
P. J.

MILLER
J.